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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID R. BENJAMIN, PHILIP C. BOURDETTE, MIRIAM R. BOURDETTE, CECILIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH MISSAKIAN, SYBIL SCHIFF, STEVEN SIMON, AND DAN SORKIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondent limits its brief in opposition to the petition for certiorari to a single issue unrelated to the questions presented by Petitioners. It urges this Court to construe broadly its recent decision in *Midland Asphalt Corp. v. United States*, 57 U.S.L.W. 4386 (March 28, 1989), to preclude interlocutory review of *all* claims concerning irregularities before the grand jury, and not simply those raising "[a]n isolated breach of the traditional secrecy requirements. . . ." 57 U.S.L.W. at 4389. Because Respondent contends that *Midland Asphalt* forecloses the

appeal on which this petition is based, it asks that the petition be granted, but requests that the judgment below be vacated and the cause remanded for further proceedings in accordance with *Midland Asphalt*.

Respondent's invitation to enlarge summarily the holding in *Midland Asphalt* is superficially appealing. On closer scrutiny, however, it cannot be squared with the plain language of *Midland Asphalt* itself or with the "positive and restrictive language" of the Grand Jury Clause of the Fifth Amendment, *Ex parte Bain*, 121 U.S. 1, 6 (1887). The question of whether the "right not to be tried" embodied in the Grand Jury Clause is invoked by deliberate prosecutorial misconduct designed to deceive the grand jury and undermine its neutrality is neither addressed nor resolved by the limited holding of *Midland Asphalt*. We concur with the Respondent that the petition should be granted; but we submit that this question, together with those raised by Petitioners, merits the full attention of the Court.

1. In *Midland Asphalt Corp. v. United States*, this Court held that motions to dismiss an indictment for alleged violations of Rule 6(e), Fed. R. Crim. P., are not appealable as collateral orders solely by virtue of whatever effect *United States v. Mechanik*, 475 U.S. 66 (1986), might have on the availability of post-conviction review of these claims. The Court reasoned that whether or not *Mechanik* affected post-trial review, claims under Rule 6(e) could not satisfy the requirements for an immediately appealable collateral order. "If *Mechanik* is not extended beyond violations of Rule 6(d) . . . it is obvious that they are not 'effectively unreviewable on appeal from a final judgment.'" 57 U.S.L.W. at 4388 (citation omitted). If, on the other hand, *Mechanik* does bar post-conviction review, then orders denying motions to dismiss "cannot be said 'to resolve an important issue completely separate from the merits of the action' . . . ." *Ibid.*

Were *Mechanik* the only basis on which a claim to immediate appellate review could be founded, Respondent would be correct in urging that *Midland Asphalt* disposes of the question of whether this Court could entertain jurisdiction on the merits. The Court made clear in *Midland Asphalt*, however, that the Grand Jury Clause of the Fifth Amendment itself affords a basis for interlocutory review. Like the rights conferred by the Double Jeopardy and Speech and Debate Clauses, the Court recognized that the Grand Jury Clause "does indeed confer a right not to be tried (in the pertinent sense)," 57 U.S.L.W. at 4389, and "that deprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being 'effectively unreviewable on appeal from a final judgment.'" *Id.* at 4388 (citations omitted).[1]

Left largely unexplored in *Midland Asphalt*, and wholly ignored by Respondent, are the parameters of that right. On the one hand, the Court left no doubt that "the lack of a grand jury indictment itself, gives rise to a right not to be tried." 57 U.S.L.W. at 4389. And it acknowledged that "[u]ndoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by" the Grand Jury Clause. *Ibid.* At the same time, the Court stressed that not "every violation of those protections" triggers the "right not to be tried." *Ibid.* In particular, the Court held that "[a]n isolated breach of the traditional secrecy requirements does not" implicate the fundamental rights protected by the Grand Jury Clause. *Ibid.*

Having identified the shoals, however, the Court left the channel essentially uncharted, except to note that "[o]nly a defect so fundamental that it causes the grand

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[1] The Grand Jury Clause reads in relevant part as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury." U.S. Const., Amdt. 5.

jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." *Ibid.* Both history and common sense dictate that the deliberate prosecutorial misconduct that the court of appeals found in this case is just such a "fundamental" defect, which squarely implicates the "right not to be tried."

As this Court has emphasized on many occasions, the Constitution requires a charging document not simply in the form of an indictment, but one "returned by a legally constituted nonbiased grand jury." *Lawn v. United States*, 355 U.S. 339, 349 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956) (Fifth Amendment requires "indictment returned by a legally constituted and unbiased grand jury"). Although "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," *Costello v. United States, supra*, 350 U.S. at 362, the right to a neutral, independent, and unbiased grand jury has strong historic underpinnings. "[I]n this country as in England of old the grand jury has convened as body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Ibid.* Indeed, the Court has said that "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960).[2] Thus, while it is true that "[t]he

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[2] As the Court put it in *Ex parte Bain, supra*, 121 U.S. at 11, the grand jury was designed

> as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.

Fifth Amendment requires no more" than a "legally constituted and unbiased grand jury," *Costello v. United States, supra*, 350 U.S. at 363, neither will it tolerate anything less.[3]

In this instance, the conduct of the prosecutor was aimed at the heart of the grand jury's neutrality and independence. The court of appeals concluded that the prosecutor deliberately insinuated into the grand jury process as a witness and "expert consultant," Pet. App. 41a, an individual, Richard Ofshe, who was in fact suing six of the nine defendants on the exact allegations that formed the basis for their indictment. It found "real merit" to the charges that the prosecutor engaged in deliberate misconduct by concealing Ofshe's conflict of interest from the district court and the grand jury. Pet. App. 20a. Rather than disclose Ofshe's private interests in the investigation to the court or to the grand jury, the government disingenuously described him to the court as a "PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of officials . . . ." Pet. App. 134a. As a result, although Ofshe testified at least once, and perhaps "several times" before the grand jury, Pet. App. 40a n.2, and was given broad access to secret grand jury material in order to assist the government in its investigation, neither the grand jury nor the court authorizing the disclosure of grand jury materials was ever made aware of the fact that he was seeking civil damages from the defendants for the "exact allegations that form the basis for the later indictment against defendants." Pet. App. 40a; *see also id.* at 3a.

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[3] There is precedent for treating fundamental defects in an indictment as the functional and legal equivalent of no indictment at all. Thus, this Court "had no difficulty in holding" in *Ex parte Bain, supra*, that an indictment that was improperly amended "was no indictment of a grand jury." 121 U.S. at 13.

This is not, in short, a disguised effort to challenge the sufficiency of the evidence before the grand jury, *see Costello v. United States*, *supra*, nor does it concern "[a]n isolated breach of the traditional secrecy requirements," *Midland Asphalt Corp. v. United States*, *supra*, 57 U.S.L.W. at 4389, with little, if any potential impact on the grand jury's independence or neutrality.[4] Rather, our claims are centered upon allegations that, through the connivance of the prosecutor, the charges in this case were the product of "private enmity," a result that the grand jury was specifically intended to prevent. *Ex parte Bain*, *supra*, 121 U.S. at 11. It is in precisely this setting that the grand jury "is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions." *Id.* at 12 (internal quotations omitted). While the Court in *Midland Asphalt* is surely correct that not "every violation of [the common-law] protections" associated with the grand jury "gives rise to a right not to be tried," 57 U.S.L.W. at 4389, it is hard to imagine what is left of those protections if the grand jury's neutrality and independence can be subverted without invoking the right.

Limiting the right not to be tried arising from the Grand Jury Clause to "the lack of a grand jury indictment itself," *Midland Asphalt Corp. v. United States*, *supra*, 57 U.S.L.W. at 4389, has the virtue of simplicity.

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[4] As the court of appeals noted in *Midland Asphalt*, the risk of harm from the 6(e) violation there was largely limited to its potential effect on the petit jury, and posed little likelihood of prejudicing the grand jury that indicted the defendants. *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988). By contrast, although one of the aspects of the prosecutorial misconduct in this case has been denominated a violation of Rule 6(e), Fed. R. Crim. P., the factual setting is entirely different. Our claim is that the government deliberately and deceitfully used the improper 6(e) disclosure in order to insinuate Ofshe into the grand jury process, with great potential impact on the grand jury's independence, even though he had no semblance or obligation of impartiality.

But there is nothing else to recommend it. Just as there is no historic basis for distinguishing between charges brought without an indictment from those returned by a grand jury that is biased or improperly constituted, neither is there any principled or even pragmatic basis for such a distinction. An individual could be brought to trial in the absence of an indictment only through the deliberate misconduct of a prosecutor seeking to circumvent the grand jury's independent scrutiny. As this Court made clear in *Midland Asphalt*, a defendant facing trial in such a circumstance would surely have the right to interlocutory appellate review of his claim that the prosecutor's conduct deprived him of rights explicitly guaranteed by the Fifth Amendment. There is no logical reason to deny interlocutory review to a defendant where a prosecutor employs different means to accomplish the same purpose with the identical effect.

Precisely because the right to indictment can be subverted by stealth as well as by direct assault, Justice Burton, concurring in *Costello*, cautioned against too broad an interpretation of the Court's declarations in that case. "I assume," he explained, "that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment." 350 U.S. at 364. "To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value of the private citizen." *Ibid.*

2. We are alert to the pragmatic concerns that have consistently informed the Court's decisions concerning the collateral order doctrine, and that underlie "the utmost strictness" with which the exception has been applied in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 265 (1984). Interlocutory review of claims of deliberate and prejudicial prosecutorial misconduct before the grand jury, however, is unlikely to interfere with the grand jury's independence or with society's interest in the

speedy disposition of criminal cases. Like the double jeopardy issues addressed in *Abney v. United States*, 431 U.S. 651 (1977), claims of prejudicial prosecutorial misconduct are not available in every case; to the contrary, the requirement that a criminal defendant present a colorable showing of misconduct affecting the grand jury's neutrality and independence warranting dismissal under *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988), "inherently limits the availability of the claim." *United States v. MacDonald*, 435 U.S. 850, 862 (1978). And unlike challenges to the sufficiency or admissibility of evidence relied upon by the grand jury, *see United States v. Calandra*, 414 U.S. 338 (1974); *Costello v. United States*, *supra*, appellate review will safeguard the grand jury's traditional independence, not undermine it.[5]

Just as important, the undoubted costs of interlocutory appellate review cannot be assessed apart from the interests it is intended to protect. As this Court long ago recognized, "the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." *Ex parte Bain*, *supra*, 121 U.S. at 10. Important claims founded upon explicit constitutional guarantees merit meaningful review. The result that we urge does nothing more than to accommodate this fundamental principle to the accepted rules governing final judgments.

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[5] Moreover, as this Court has observed on more than one occasion in the face of government admonitions of chaos in the criminal justice system, where interlocutory review is called for under the collateral order doctrine, efficient means may be found to expedite such appeals and to weed out groundless claims. *Richardson v. United States*, 468 U.S. 317, 322 (1984); *Abney v. United States*, *supra*, 431 U.S. at 662 n.8.

CONCLUSION

We concur with the Respondent that a writ of certiorari should be granted. Because the important issues raised by both Petitioners and Respondent are only touched upon in *Midland Asphalt*, however, the court of appeals lacks sufficient guidance to address them without further and full attention from this Court.

Respectfully submitted,

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